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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

and

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Petitioners,

vs.

LARRY G. HARDISON and TRANS WORLD AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Motion of Chrysler Corporation for Leave to File Brief Amicus Curiae in Support of Petitioners

and

Brief of Chrysler Corporation as Amicus Curiae

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MOTION OF CHRYSLER CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Chrysler Corporation ("Chrysler"), pursuant to Supreme Court Rule 42(3), hereby moves for leave to file the attached brief *amicus curiae* in support of the petitioners in these consolidated cases.[1] The consent of counsel for the International Association of Machinists and Aerospace Workers, International

[1] By order of this Court, entered on November 15, 1976, the petitions for writs of certiorari were granted and these cases were consolidated. 45 U.S.L.W. 3359.

Association of Machinists and Aerospace Workers, District 142, and International Association of Machinists and Aerospace Workers, Local 1650, [collectively referred to herein as "Machinists"] was requested and received. The consents of counsel for Larry G. Hardison and Trans World Airlines were sought and denied.[2]

Chrysler is a major manufacturer and distributor of motor vehicles and parts, transacting business both in interstate and foreign commerce. Its United States work force, involved principally in the manufacture and distribution of motor vehicles and parts, numbers in excess of 130,000, and of these, approximately 108,500 employees, or 83%, are encompassed by Chrysler's collective bargaining agreements with the United Automobile, Aerospace, and Agricultural Implement Workers of America. Pursuant to the provisions of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, these collective bargaining agreements govern Chrysler's relationship to its employees regarding wages, hours and other terms and conditions of employment.

This case requires this Court to determine the constitutionality of the statutory duty, imposed by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(j) ["Title VII"], of an employer to reasonably accommodate the religious needs of an employee. Chrysler's interest in this action evolves from its need, as a major American employer, to know the specific legal standard applicable to employers when they are confronted with a request for the modification of uniform contractual work standards and hours due to the individual's religious observances.

---

[2] Chrysler has participated in this case previously by obtaining the consents of the parties and filing a brief *amicus curiae* in support of the petition for a writ of certiorari of Trans World Airlines (No. 75-1126). The written consent of the Machinists, to the filing of this brief, has been filed with the Clerk.

The immediate interest of Chrysler in this case arises from its status as a party to *Blakely v. Chrysler Corporation et al.*, 407 F.Supp. 1227 (E.D. Mo. 1975), presently pending in the Court of Appeals for the Eighth Circuit (No. 76-1196). The *Blakely* case also involves allegations of religious discrimination, and the action of this Court in the instant case will be outcome-determinative as to first amendment issues raised in *Blakely*.

In this case, the petitioners have not addressed themselves to pertinent constitutional questions arising under the due process clause in either their briefs filed in the Eighth Circuit or their respective petitions for certiorari. Neither have they considered the issue as to what duty, if any, is by necessary implication, imposed upon an employee who seeks accommodation of his religious needs.

It is believed that the views presented herein are relevant to this case and will aid in the disposition of the difficult issues before this Court.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF CHRYSLER CORPORATION IN SUPPORT OF PETITIONERS

SUMMARY OF ARGUMENT

The duty of reasonable accommodation, imposed by § 701(j) of Title VII and as interpreted by the courts, requires a private employer to modify uniform work obligations, in order to satisfy the religious needs of any employee. The imposition of this

duty by the federal government contravenes the letter and spirit of the establishment clause of the first amendment.

Even if this duty can withstand scrutiny under the first amendment, it is constitutionally infirm under the due process clause of the fifth amendment. This infirmity arises because the duty of reasonable accommodation, which is an affirmative duty imposed upon an employer, is not codified with the requisite degree of specificity. Consequently, an employer is unable to discern, with reasonable certainty, the parameters of the duty imposed and the conduct proscribed which may give rise to liability.

The duty of reasonable accommodation is not a unilateral duty imposed solely upon an employer. Rather, it is a bilateral duty which includes the initial obligation of an employee, who seeks accommodation, to accommodate his own religious beliefs. The employee's fulfillment of this initial duty of "self-accommodation" is a condition precedent to the imposition of liability upon his employer.

ARGUMENT

I

The Duty of Reasonable Accommodation Is Unconstitutional Under the Establishment Clause of the First Amendment.

At issue is the constitutionality of § 701(j) of Title VII which requires an employer to reasonably accommodate an employee's religious beliefs through the modification of uniform work obligations established pursuant to a collective bargaining agreement. It is submitted that the imposition of this duty cannot withstand constitutional scrutiny for it is violative of the first amendment and the cardinal principle of governmental neutrality toward religion.

A. The statutory and guideline scheme.

Since 1964 § 703(a)(1) of Title VII has provided in relevant part:

> "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

In 1966 the Equal Employment Opportunity Commission ("EEOC") promulgated its initial guideline [29 C.F.R. § 1605.1, 31 Fed. Reg. 8370] to implement this statutory prohibition against religious discrimination.[3] This guideline established a

[3] In its entirety, the 1966 religious discrimination guideline, 29 C.F.R. § 1605.1 (31 Fed. Reg. 8370) stated:

> "Section 1605.1 Observance of Sabbath and religious holidays.—(a)(1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.
>
> (2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.
>
> (3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.
>
> Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur:
>
> (b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful.
>
> (1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.
>
> (2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.
>
> (3) The employer may prescribe the normal work week and foreseeable overtime requirements, and absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

general obligation to accommodate an employee's religious needs when this could be accomplished without serious business in-

convenience. Absent an intent to discriminate on a basis of religion, an employer was specifically permitted to prescribe a normal work week, including overtime, and an applicant or employee, knowing that these requirements might pose a conflict, was not entitled to demand an alteration.

Subsequently, in 1967, this guideline was replaced by the present administrative guideline which imposed an unprecedented obligation upon an employer to defer to his employee's professed religious beliefs.[4] Some courts questioned whether the

(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

[4] The present guideline, 29 C.F.R. § 1605.1 (32 Fed. Reg. 10298), states:

"Section 1605.1 Observance of Sabbath and other religious holidays.—(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

EEOC's 1967 guideline was authorized by the original statutory prohibition against religious discrimination. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 331 n.1, 334 [12-16]

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

It is submitted that in accord with this Court's recent opinion of *Gilbert v. General Elec. Co.*, 45 U.S.L.W. 4031, (U.S. Dec. 7, 1976) (Nos. 74-1589, 74-1590) the 1967 EEOC guideline should be accorded little, if any, weight. In *Gilbert* the Court stated:

> In evaluating this contention [that the EEOC guidelines are entitled to great deference] it should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent, see *Albemarle, supra; Griggs v. Duke Power Co.*, 401 U.S., at 433-434; *Espinosa v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973). But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, see *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942), or to regulations which under the enabling statute may themselves supply the basis for imposition of liability, see, *e.g.*, § 23(a), Securities Act of 1934, 15 U.S.C. § 78w(a). The most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines is found in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), where the Court said:
>
> > "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"

The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title. More importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." [Footnote omitted] *Id.* at 4035-36.

(6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971); *Kettell v. Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972). The *Dewey* case prompted Congress in 1972 to amend Title VII[5] by codifying the following definition of the term "religion" as §701(j) of the Act:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

This statutory definition parallels the reasonable accommodation theory of the 1967 EEOC guideline. *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 517 n.1 (6th Cir. 1975); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 547 (6th Cir. 1975), *aff'd by an equally divided Court*, 45 U.S.L.W. 4009 (U.S. Nov. 2, 1976) (No. 75-478).

This analysis is applicable with equal force to the religious discrimination guidelines for, as noted by the Court, the EEOC is, by virtue of § 713(a) of Title VII [42 U.S.C. § 2000e-12(a)], without statutory authority to promulgate substantive rules or regulations. *E.g., Gilbert, supra; EEOC v. Raymond Metal Prods. Co.*, 530 F.2d 590, 593 (4th Cir. 1976); *Reynolds Metals Co. v. Rumsfeld*, 417 F. Supp. 365, 372 (E.D. Va. 1976); *Dobbins v. IBEW Local 212*, 292 F. Supp. 387, 414-15 (S.D. Ohio 1968). Insofar as it cannot be seriously questioned that the religious discrimination guideline is substantive, it exceeds the EEOC's statutory power, is null and void and should be disregarded. *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134-35 (1936); *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 519-20 (6th Cir. 1975) *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 15, 1976) (No. 75-1105).

[5] This amendment was accomplished by passage of The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, effective March 24, 1972. The legislative history is quite explicit indicating that Congress was responding directly to the *Dewey* decision. The Conference Committee Report to the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7167 (1972) states:

> "The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines because of religion such as those challenged in *Dewey v. Reynolds Metals Company*, 429 F.2d 325 (6th Cir. 1970), Affirmed by an equally divided court, 402 U.S. 689 (1971)."

At least one court of appeals has held that the EEOC's 1967 guideline even exceeds the scope and intent of this 1972 amendment to Title VII and that the statute requires employers to refrain only from religious discrimination. *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 519-21 (6th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 15, 1976) (No. 75-1105).

B. The duty of reasonable accommodation does not fulfill the Supreme Court's tripartite tests.

The establishment clause of the first amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting the establishment of religion. . . ."

This Court, when called upon to interpret this provision, has frequently reiterated the following maxim:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. • • • In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'."

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

In order to determine whether challenged legislation impermissibly causes a breach in the "wall of separation", this Court has required the fulfillment of the following tripartite tests, to be applied disjunctively.

> "[T]he law in question, first, must reflect a clearly secular legislative purpose, • • • second, must have a primary effect that neither advances nor inhibits religion, • • • and, third, must avoid excessive government entanglement with religion." [citations omitted]

Committee for Public Educ. v. Nyquist, 413 U.S. 756, 773 (1973). Thus, in the context of the immediate inquiry, § 701(j) of the Act and the EEOC guideline must satisfy each of the above tests. Chrysler respectfully submits that neither § 701(j) nor the EEOC guideline can fulfill any of the three tests stated in *Nyquist* and that they are therefore unconstitutional.

1. Section 701(j) lacks a clearly secular legislative purpose.

The legislative history, pertaining to the 1972 amendments to Title VII, distinctly indicates the ecclesiastical purpose behind that provision. Its examination is relevant in view of this Court's determination to accept at face value, the statement of Congress as to its purpose in adopting legislation which is subsequently challenged on establishment clause grounds. *E.g., Meek v. Pittenger*, 421 U.S. 349, 363 (1975); *Sloan v. Lemon*, 413 U.S. 825, 829-30 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

The following remarks of Senator Randolph, who offered the disputed provision as a floor amendment, reveal clearly that the advancement of Saturday Sabbatarian religions was the purpose behind this legislation:

> "I am sure that my colleagues are well aware that there are several religious bodies—we could call them religious sects; denominational in nature—not large in memberships, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and re-

> quire that the observance of the day of worship, the day of the Sabbath, be other than on Sunday. On this day of worship work is prohibited whether the day would fall on Friday, or Saturday or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh Day Adventists.
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> • • •
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> I say to the distinguished chairman of the Labor and Public Welfare Committee who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.
> My own pastor in this area, Rev. Delmar Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people and understandably so, with reference to a possible inability of employers on some occasions to adjust to work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (1972).

Thus, with unmistakable clarity, the legislative history indicates an "abandon[ment of] secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette v. United States*, 401 U.S. 437, 450 (1971). Hence, the first of the tripartite tests cannot be fulfilled.

2. Section 701(j) has a primary effect which advances religion.

In cases in which the purpose of the law was at issue, this Court has examined not only its avowed purpose, but also its effect. Thus, it is required that the challenged legislation must have a primary effect which neither advances nor inhibits religion and which is evenhanded in operation. *Gillette v. United States*, 401 U.S. 437, 450 (1971). Consequently, a law which advances all religions violates the establishment clause. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Illinois ex rel. McCullom v. Board of Educ.*, 333 U.S. 203 (1948).

Cases which have upheld laws providing benefits to believers have done so on the ground that the law affects believers and non-believers equally. In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), a state plan to subsidize bus transportation for all students was upheld on the basis that the legislation only helped parents to get their children to and from school. In reaffirming the neutrality principle the Court stated: "[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers . . ." 330 U.S. at 18. Similarly, in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court upheld a state law that provided secular textbooks for all students in grades seven through twelve. The Court found that "[t]he law merely makes available to all children the benefits of a general program to lend school books free of charge." 392 U.S. at 243. In both of the above cases, the law operated equally as to all students and provided nothing to believers that it did not provide to non-believers. Consequently, it was evident that the laws were fundamentally neutral and only served the secular purpose of advancing education.

Section 701(j) of Title VII and the EEOC guideline, however, do not operate in a neutral manner. Rather than requiring

an employer to treat all employees equally, the statute and guideline require that an employer give preferential treatment to an employee in order to accommodate that employee's religious needs.[6] In essence, the statute requires that non-believing employees bear the consequential burden imposed by the religious preferences of other employees. Therefore, although the guideline ostensibly provides for employment security, by not allowing an employer to discharge an employee for the employee's inability, because of religious beliefs, to conform to the applicable work rules,[7] in application the guideline promotes the religion of the particular employee by imposing upon the employer and other employees the inconvenience and burden of the employee's inability to conform. *Cummins v. Parker Seal Co.*, 516 F.2d 544, 554 (6th Cir. 1975) (dissenting opinion).

The constitutionality of the duty of reasonable accommodation, in terms of its effect, was questioned in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970) *aff'd by an equally divided Court*, 402 U.S. 689 (1971):

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[6] The duty of reasonable accommodation imposed upon Chrysler and other employers far exceeds the scope of any other duty created by Title VII. Indeed, a discriminatory religious preference results from this duty. This is contrary to the pronouncement of the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):

> "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431.

[7] This duty is mandated despite the existence of a bona fide seniority or other collective bargaining provision which may be within the ambit of § 703(h) of the Act [42 U.S.C. § 2000e-2(h)] which states in relevant part:

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of . . . religion. . . ."

"To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. It is settled that the Government, in its relations with religious believers and non-believers, must be neutral. The Government is without power to support, assist, favor or handicap any religion.

* * *

No one disputes Dewey's right to his religious beliefs. The question is whether he has the right to impose his religious beliefs on his employer and interfere with the operation of its plant." *Id.* at 334-35.

Other courts have also questioned the constitutionality of §701(j). *Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 15, 1976) (No. 75-1105); *Yott v. North Am. Rockwell*, Civil No. 71-1918-R (C.D.Cal., filed Jan. 10, 1977); *Fischer v. Alsing*, 7 FEP Cases 220 (D.Ore. 1974); *Kettell v. Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972); *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971).

The first of two prohibited effects, resulting from the imposition of the duty of reasonable accommodation, is that it discriminates against the irreligious: It prefers, and confers employment advantages upon those who are religious over those who are not. It cannot be questioned that by mandating that the religious needs of an employee be accommodated by his employer, that particular employee is substantially benefited. No similar benefit is conferred upon those who are without a religious affiliation. This preferential advantage was recognized in *Cummins v. Parker Seal Co.*, 516 F.2d at 558 (dissenting opinion):

> "Only those with 'religious practices' may benefit from the rule. Others are forced to submit to uniform work rules

> and to bear the burdens imposed by their employers' accommodation to religious practitioners. Thus, the rule discriminates against those with no religion, although the freedom not to believe is within the First Amendment's protection."

Thus, the first amendment's prohibition, which has been interpreted to forbid the aiding of all religions as against non-believers, is violated. *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Secondly, Saturday Sabbatarian faiths are particularly benefited from the accommodation mandate. As noted by Senator Randolph, by virtue of governmental assistance, such faiths may experience "a somewhat larger attendance with the correspondingly fuller collection plate." *Cummins v. Parker Seal Co.*, 516 F.2d at 553. This duty imposes upon employers and other employees the views of the employee who is a Saturday Sabbatarian or whose beliefs fall outside the mainstream of American religions. Thus, it is clear that the accommodation requirement discriminates between religions and violates the requirement of government neutrality between religions. *Zorach v. Clauson*, 343 U.S. 306, 315 (1952), *see also Everson v. Board of Educ.*, 330 U.S. 1 (1947). Therefore, the reasonable accommodation laws are more advantageous to the World Wide Church of God than to non-Sabbatarian faiths. This further preferential effect was noted in *Cummins, supra,* (dissenting opinion):

> "Only those [religions] which require their followers to manifest their belief in acts requiring modification of an employer's work rules benefit, while other employees are inconvenienced by the employer's accommodation. By singling out particular sects for government protection, the Federal Government has forfeited the pretense that the rule is merely part of the general ban on religious discrimination." *Id.* at 558.

Insofar as the duty of reasonable accommodation has a primary effect that advances religion generally, and some religions specifically, it runs afoul of the second of the tripartite tests and is constitutionally infirm. *Walz v. Tax Commission*, 397 U.S. 664, 695 (1970); *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963).

3. Section 701(j) requires excessive government entanglement with religion.

Third and lastly, the statute and EEOC guideline must avoid excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz, supra*. The entanglement of the government with this issue is twofold: first, the statutory notion of a "religious belief" is vague and elusive for it is stated in § 701(j) that: "religion includes all aspects of religious observance and practice, as well as belief . . .". Therefore, the pronouncement of this Court in *Gillette v. United States*, 401 U.S. 437 (1971) is relevant to this stautory definition:

> "[I]t is true that 'the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement' in determining the character of persons' beliefs and affiliations, thus entangl[ing] government in difficult classifications of what is or is not religious' . . ." *Id.* at 457.

The definition of "religion", codified at § 701(j) is also inadequate for, upon its face, it is circular. It states that religion is religion unless an employer proves undue hardship. Thus, if undue hardship exists, religion does not.[8]

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[8] *See* section III *infra* at p. 24.

The unlimited scope of this provision necessarily requires extensive government entanglement through review by both the EEOC[9] and the courts of the nature of the employee's beliefs, the sincerity and depth of his belief, and whether the employee's asserted need for accommodation is bona fide. *See, e.g., Kettell v. Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972); Comment, 44 Fordham L. Rev. 442, 449 n. 6 (1975). There are innumerable instances in which an employee may, in the context of § 701(j), seek an accommodation of any "aspect of religious observance and practice, as well as belief."[10]

This danger of entanglement was recognized in *Cummins v. Parker Seal Co.*, 516 F.2d 544, 559 (6th Cir. 1975) (dissenting opinion), *aff'd by an equally divided Court*, 45 U.S.L.W. 4009 (U.S. Nov. 2, 1976) (No. 75-478):

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[9] The filing of a charge with the EEOC is a jurisdictional prerequisite to the maintenance of suit under § 706 of Title VII, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). Therefore, the EEOC, in the first instance, is "entangled" in determining whether the employee's professed beliefs constitute a "religion".

As to Saturday Sabbatarians, the EEOC has even determined that an employee, who was not affiliated with any identifiable religious order, but who felt that Saturday was to be observed as a day of rest, was within the ambit of § 701(j). EEOC Decision No. 76-104, 12 FEP Cases 1359 (April 2, 1976).

[10] *E.g., Young v. Southwest S & L Ass'n*, 509 F.2d 140 (5th Cir. 1975) [atheist objected to prayer conducted at employee meetings]; *Yott v. North Am. Rockwell*, 501 F.2d 398 (9th Cir. 1974) [religious objection of employee to payment of union dues]; *Geller v. Secretary of Defense*, 13 FEP Cases 1118 (D. D.C. 1976) [Rabbi wearing a beard]; *Weitkenhaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974 [church minister's need to attend meetings]; *Abdush-Shadid v. Narcotics Comm'n*, 12 FEP Cases 136 (Sup. Ct. N.Y. 1975) [Muslim's dress requirements]. *See generally*, P. Kamper, *Religion and the Constitution* (1964); Edwards and Kaplan, Religious Discrimination and the Role of Arbitration under Title VII, 69 Mich. L. Rev. 599 (1971); Note, Religious Observance and Discrimination in Employment, 22 Syracuse L. Rev. 1019 (1971); Annot., 22 A.L.R. Fed. 580 (1975).

> "Disposition of [religious discrimination] complaints . . . will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters. [n. 11] *See United States v. Ballard*, 322 U.S. 78 (1944); *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)."

Thus, under the scheme of § 701(j) and EEOC Guideline 1605.1, the government is excessively entangled with religion. Therefore, the third of the tripartite tests enunciated in *Nyquist, supra*, is violated and the provisions at issue are unconstitutional under the establishment clause of the first amendment.

II

Section 701(j) Is Constitutionally Infirm Under the Due Process Clause of the Fifth Amendment.

The constitutional standard of due process of law, specified by the fifth amendment is applicable to corporations. *E.g., Sinking Fund Cases*, 99 U.S. 700, 719 (1879). In the context of reviewing §701(j) of Title VII, it must be determined whether the duty of reasonable accommodation is codified with sufficient definiteness or is impermissibly vague. It is submitted that this statute fails to comport with this constitutional standard.[11]

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[11] It is recognized that this issue was not presented to, or considered by the Eighth Circuit. However, because of the importance of this question, the resolution of which does not require an examination of any evidence, it may properly be considered by the Court. *Giordenello v. United States*, 357 U.S. 480, 484 n.2 (1958); *Jordan v. DeGeorge*, 341 U.S. 223 (1951); *Kiefer-Stewart v. Joseph E. Segram & Sons, Inc.*, 340 U.S. 211 (1950); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1944); *cf., United*

The statutory duty of reasonable accommodation is not directly specified in §701(j) of the Act but rather, arises by implication from the Congress' definition of "religion" contained in that section:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

From the above language it is apparent that not only is the existence of the duty of reasonable accommodation obscure, but only through clairvoyance can the parameters of that duty be ascertained with reasonable certainty. As a result of the foregoing, unlawful religious discrimination in employment has been determined judicially, on an *ad hoc* basis, by converse definition: Religious discrimination against the employee exists if undue hardship does not exist for the employer.[12]

Brotherhood of Carpenters v. United States, 330 U.S. 395, 411-12 (1946). In *Kiefer-Stewart, supra*, the Court wrote:

> "Respondents also seek to support the judgment of reversal on other grounds not passed on by the Court of Appeals but which have been argued here both orally and in the briefs. These grounds raise only issues of law not calling for examination or approval of evidence and we will consider them." *Id.* at 214.

An additional issue appropriate for consideration is, assuming *arguendo*, the constitutionality of the duty of reasonable accommodation, when did that duty arise? Insofar as the effective date of the 1972 amendments to Title VII, was March 24, 1972, and as the EEOC lacked the statutory authority for its guideline prior to that date, *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970) *aff'd by an equally divided Court*, 402 U.S. 689 (1971), no liability should be imposed for pre-amendment acts. Otherwise, the imposition of liability would retroactively create an obligation which did not exist at the time of the acts complained of. *E.g., Weise v. Syracuse Univ.*, 522 F.2d 397 (2d Cir. 1975); *cf. William Danzer & Co. v. Gulf & Ship Island R. R. Co.*, 268 U.S. 633, 637 (1925).

[12] *E.g., Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976) *aff'g*, 378 F. Supp. 1258 (D. Vt. 1974); *Williams v. Southern*

The vagueness doctrine, as a fifth amendment due process standard, requires that a statute be precise and definite enough upon its face to give fair warning that certain conduct is proscribed. *E.g., Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Const. Co.*, 269 U.S. 385 (1926). The vagueness doctrine, while most often invoked in the context of a criminal statute, is applicable with equal force and validity to a civil statute. *E.g., Jordan v. DeGeorge*, 341 U.S. 223, 231 (1950); *Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *see Miller v. Strahl*, 239 U.S. 426 (1915); *cf. Boyce Motor Lines v. United States*, 342 U.S. 337 (1952); *United States v. Darby*, 312 U.S. 100

Union Gas Co., 529 F.2d 483 (10th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 16, 1976) (No. 75-1511); *United States v. City of Albuquerque*, 13 FEP Cases 1564 (10th Cir. 1976) *aff'g*, 10 FEP Cases 771 (D. N.M. 1975); *Young v. Southwest S & L Ass'n*, 509 F.2d 140 (5th Cir. 1975); *Roberts v. Hermitage Cotton Mills*, 498 F.2d 1397 (4th Cir. 1974) *aff'g*, 8 FEP Cases 315 (D. S.C.); *Yott v. North Am. Rockwell*, 501 F.2d 398 (9th Cir. 1974); *Bradington v. International Business Machs. Corp.*, 492 F.2d 1240 (4th Cir. 1974) *aff'g*, 360 F. Supp. 845 (D. Md. 1973); *Burns v. Southern Pac. Transp. Co.*, 11 FEP Cases 1441 (D. Ariz. 1976); *Ward v. Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375 (W.D. Pa. 1975); *Olds v. Tennessee Paper Mills*, 11 FEP Cases 350 (E.D. Tenn. 1974); *Dixon v. Omaha Pub. Power Dist.*, 385 F. Supp. 1382 (D. Neb. 1974); *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974); *Shaffield v. Northrop Worldwide Aircraft Servs. Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974); *Fischer v. Alsing*, 7 FEP Cases 220 (D. Ore. 1974); *Drum v. Ware*, 7 FEP Cases 269 (W.D. N.C. 1974); *Claybaugh v. Pacific Northwest Bell Tel. Co.*, 355 F. Supp. 1 (D. Ore. 1973); *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971).

A review of the case law on religious discrimination indicates that each case is judged on its specific facts. Collectively, the factors deemed relevant include: 1. The religious needs of the employee; 2. The skills utilized or job performed by that employee; 3. The operational requirements of the employer's business; 4. The size of the employer's work force; 5. The number and availability of employees having similar skills or performing similar tasks to that of the employee who seeks accommodation; 6. The existence of a collective bargaining agreement; 7. The operational necessity of having that employee's work performed in his absence; 8. The effect of accommodation on other employees.

(1941); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see generally*, Note, "Due Process Requirements of Definiteness in Statutes," 62 Harv. L. Rev. 77 (1948). Thus, a provision, such as §706(g) Title VII, which subjects those in violation thereof to damages, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), must give adequate notice so that liability could have been avoided by appropriate conduct.

This due process concept is particularly important in the context of §701(j) which imposes an affirmative duty upon an employer to take action by reasonably accommodating his employee's religious needs. Thus, under §701(j) the employer is required to take positive, affirmative action rather than merely to refrain from prohibited conduct. Viewed, therefore, as a guide to an employer's future conduct, §701(j) of the Act falls short of the mark for it is a law ". . . requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).

It is a further premise that due process requires that the judicial determination of rights and duties "be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result." 62 Harv. L. Rev. at 77. In this due process context, § 701(j) of the Act is inadequate as a guide to adjudication insofar as courts ". . . are free to decide without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *Ricks v. District of Columbia*, 414 F.2d 1097, 1101 (D.C. Cir. 1968). The *ad hoc* opinions, rendered in religious discrimination cases,[13] which do not establish any pattern of consistency in the application of § 701(j), indicate that this statute fails miserably as a guide to adjudication. *E.g., compare, Johnson v. United States Postal Serv.*, 497 F.2d 128

[13] *See* n. 12 *supra*.

(5th Cir. 1974), *aff'g* 364 F. Supp. 37 (N.D. Fla. 1973), *and Roberts v. Hermitage Cotton Mills*, 498 F.2d 1397 (4th Cir. 1974), *aff'g* 8 FEP Cases 315 (D.S.C. 1973) *with Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975).

Section 701(j) of Title VII runs afoul of the due process requirements mandated by the fifth amendment and the case law thereunder—it fails as a guide to both the future conduct of the employers it regulates, and as a guide to the courts which are required to adjudicate its meaning. Therefore, § 701(j) is constitutionally infirm under the fifth amendment.

III

An Initial Duty of Self-Accommodation Is Imposed Upon an Employee Who Seeks Accommodation of His Religious Needs.

Distinct from sex or race discrimination, religious discrimination is dependent upon the existence of intangible concepts uniquely known, at the onset, only by the alleged discriminatee. While an employer is capable of visually ascertaining sex or race, religious affiliation and precepts cannot be detected by the senses. Due to this very critical distinction, a duty of "self-accommodation" must be imposed, in the first instance, upon an employee who claims that his religion conflicts with his work obligations. Additionally, because the reasonable accommodation of an employee's religion necessarily requires his active participation and assistance, it is both logical and fair that an employee should be required to assert his best efforts.

This duty arises by necessary implication, and is a corollary to the duty of reasonable accommodation imposed by § 701(j) of Title VII. As the parameters of the duty of reasonable accommodation are not articulated with certainty, it is of importance that this Court determine, for the guidance of all em-

ployers, the legal standard applicable when an employer is confronted with a request for the modification of contractual work standards and hours. Additionally, as this case is one of first impression in this Court, and will serve as a guide to future adjudications, a comprehensive delineation of the requisites of the duty of reasonable accommodation is warranted. Thus, this case, akin to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), will govern the nature of proof required in religious discrimination actions.

The duty of "self-accommodation" suggested herein includes the fourfold obligation of an employee to: 1. Promptly notify his employer of his claimed affiliation and the tenets of his religion; 2. Provide his employer with documentation or the means to verify the claimed religious affiliation and the tenets of the religion which conflict with his work obligations; 3. Participate in the formulation of a program or method of reasonable accommodation and 4. Cooperate in implementing the accommodation.

As an initial step, it is obviously necessary that an employee who seeks accommodation of his religious needs, promptly inform his employer of his religious affiliation and the tenets of his faith which conflict with work obligations. Without this information it would be impossible for an employer to know to reasonably accommodate the employee.

Secondly, it is certainly reasonable to require an employee to present documentation of, or provide his employer with the means to verify his claimed affiliation with a religious sect and the tenets of his faith. Without such information, an employer could not reasonably assure himself that the claim is bona fide rather than an attempt to avoid work obligations. The requirement of this documentation is certainly reasonable when accommodation may require a shift change or an excuse

from work in contravention of a collective bargaining agreement including its seniority provisions.[14]

Thirdly, insofar as only the employee seeking accommodation is familiar with the dictates and requirements of his faith, he should be required to participate in formulating a plan of accommodation. Lastly, the employee himself must, on a continuing basis, cooperate fully with his employer in implementing a plan of accommodation.

This Court should take cognizance of the fact that the duty of reasonable accommodation is not a unilateral duty imposed solely upon the employer. Rather, this duty is bilateral and the employee must, as a minimum, fulfill the obligations enumerated herein. *See United States v. City of Albuquerque*, 13 FEP Cases 1564 (10th Cir. 1976) *aff'g*, 10 FEP Cases 771 (D. N.M. 1975). If the employee fails in the fulfillment of any aspect of his duty of "self-accommodation" it surely would be an injustice to impose liability upon his employer, absent a showing that the employer's actions precluded performance by the employee.

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[14] It should be noted that the employer, by dealing directly with the employee, represented by a collective bargaining agent, may be committing an unfair labor practice proscribed by the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. Thus, this documentation is also needed in order to provide an employer with evidence if an unfair labor practice charge is filed.

CONCLUSION

For the foregoing reasons, Chrysler Corporation, as *amicus curiae*, respectfully submits that this Honorable Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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